

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BETTY LOWE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,741
<b>THE JONES STORE COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appeal from the Award entered by Administrative Law Judge Robert H. Foerschler on January 26, 2000.

**APPEARANCES**

Claimant appeared by her attorney, Lisa R. McWilliams of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Stephanie Warmund of Overland Park, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopts the stipulations set forth in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant permanent partial disability compensation for a 20 percent scheduled injury to the forearm based upon the functional impairment rating given by the court appointed independent medical examiner, Dr. Lynn D. Ketchum. Claimant's medical expert, Dr. P. Brent Koprivica, gave the same rating. Respondent contends the opinion of its expert, Dr. Gary L. Barker who was also the treating surgeon, that claimant had an 8 percent permanent partial impairment at the wrist level should be the basis of claimant's permanent partial disability award.

Respondent contends the Administrative Law Judge erred in admitting the report from the court ordered independent medical examination by Dr. Ketchum when his

deposition testimony was not taken. Claimant argues respondent cannot raise this issue for the first time on appeal and that, in any event, the report was properly admitted.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire evidentiary record filed herein and considering the briefs of the parties, the Appeals Board finds the ALJ's Award should be affirmed.

The parties stipulated that claimant suffered a work related injury on April 3, 1998. The evidence is uncontradicted that claimant suffered a permanent partial loss of use of her right wrist and is entitled to an award for a scheduled injury at the level of the forearm. See K.S.A. 1997 Supp. 44-510d(a). Respondent argues in its brief to the Board that the parties stipulated at the pretrial settlement conference that claimant suffered a scheduled injury, but this is not part of the stipulations announced at the October 12, 1999 Regular Hearing. The nature and extent of claimant's disability was specifically made an issue. The parties also acknowledged that, as a result of the disagreement between the ratings given by claimant's and respondent's experts, the ALJ ordered an independent medical examination. See K.S.A. 1997 Supp. 44-510e(a) and K.S.A. 44-516.

The Regular Hearing transcript reflects that the Judge appointed Dr. Ketchum to perform an independent medical exam and that Dr. Ketchum had furnished his report. There was no stipulation by the parties that Dr. Ketchum's report could be included in the record, merely the statement by the ALJ regarding the appointment and Dr. Ketchum's report. On the other hand, there was no objection made to the ALJ concerning Dr. Ketchum's report.

Claimant, in her submission letter of November 12, 1999, to the ALJ, listed the June 23, 1999, independent medical examination report of Dr. Ketchum as part of the record. Respondent, in its January 11, 2000, submission letter to the ALJ, for the first time objected to the inclusion of Dr. Ketchum's report, citing K.S.A. 44-519.

As stated, even without the report of Dr. Ketchum, there is still evidence in the record supporting the 20 percent functional impairment to the forearm, but respondent argues that Dr. Baker's 8 percent rating becomes the most credible opinion. The ALJ, in both the May 19, 1999 Order for Independent Examination and in the Award, cited K.S.A. 44-510e(a) as the basis for his ordering an IME by Dr. Ketchum. That statute provides:

If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to

this section **shall** issue an opinion regarding the employee's functional impairment which **shall** be considered by the administrative law judge in making the final determination. (Emphasis added.)

As claimant's award was for a scheduled injury under K.S.A. 1997 Supp. 44-510d and not a general body disability under K.S.A. 1997 Supp. 44-510e, respondent contends the appointment of Dr. Ketchum as an independent medical examiner was pursuant to K.S.A. 44-516 which states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct.

K.S.A. 44-519 states:

No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determination or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross-examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

The Appeals Board agrees that respondent failed to make a timely objection to the ALJ's Order for Independent Examination and the admission of Dr. Ketchum's report. The May 19, 1999 order specifically states that the report will be added to the administrative record. To object only after the record is closed precludes claimant the option of taking Dr. Ketchum's deposition. Nevertheless, because there is the possibility of a further appeal, we will address the merits of respondent's objection.

Pursuant to K.S.A. 77-415(4), a regulation has the force of law. There is, however, a conflict between K.A.R. 51-9-6 and K.S.A. 44-519. The administrative regulation allows the report of a neutral physician to be made a part of the record of hearing. When a regulation is in conflict with a statute, the statute must be followed and the regulation

disregarded. Lakeview Village, Inc., v. Board of Johnson County Comm'rs., 232 Kan. 711, 659 P.2d 187 (1982).

Here, however, the regulation does not stand alone. K.S.A. 44-516 gives the Director the authority to employ one or more neutral health care providers to make such examinations of the injured party as the Director may direct. K.S.A. 1997 Supp. 44-510e allows the ALJ to appoint an independent health care provider when there is a dispute regarding claimant's functional impairment in general body disability disputes. The health care provider, providing an evaluation pursuant to K.S.A. 1997 Supp. 44-510e, shall issue an opinion regarding claimant's "functional impairment," and this opinion "shall be considered by the administrative law judge in making the final determination." In this instance, the ALJ directed Dr. Ketchum to determine claimant's functional impairment.

As K.S.A. 1997 Supp. 44-510e mandates that the opinion of the physician shall be considered for the purpose of functional impairment, the question becomes whether the exclusions of K.S.A. 44-519 can apply. This statutory conflict has also been addressed by the Kansas Court of Appeals on several occasions. The Court of Appeals has ruled that K.S.A. 1997 Supp. 44-510e(a) creates "a narrow exception to the general rules of K.S.A. 44-519." Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997); *see also* McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996). The Appeals Board has also addressed this conflict, not only in the context of K.S.A. 1997 Supp. 44-510e, but also in dealing with K.S.A. 44-516. In Wiley v. Dillon Companies, Inc., WCAB Docket No. 205,235 (March 1999), the Appeals Board found little distinction between a report generated under K.S.A. 1997 Supp. 44-510e and one generated pursuant to K.S.A. 44-516. In applying the Sims and McKinney logic, the Appeals Board allowed the independent medical examination report of Dr. Lucas to be admitted without his testimony. *See also* Haataja v. General Riggers & Erectors, Inc., WCAB Docket No. 173,814 (March 1997).

Here, the independent medical examination ordered by the ALJ was specifically for the purpose of assessing claimant's functional impairment. Under K.S.A. 1997 Supp. 44-510e, when dealing with a general body disability, this report would be part of the record. At the time the IME was ordered there was no stipulation to a scheduled injury. Furthermore, the legislature was mindful of the provisions of K.S.A. 44-519 when it amended K.S.A. 44-510e(a) and, therefore, its intent must have been to preclude the application of K.S.A. 44-519 to neutral physician reports ordered by an ALJ. The Board finds there should be no distinction between an IME report ordered under K.S.A. 44-516 for a scheduled injury under K.S.A. 1997 Supp. 44-510d and one ordered under K.S.A. 1997 Supp. 44-510e. Therefore, the ALJ did not err by considering the report of Dr. Ketchum.

The Appeals Board finds that claimant is entitled to a 20 percent permanent partial disability to the right upper extremity at the level of the forearm.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated January 26, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lisa R. McWilliams, Kansas City, MO  
Stephanie Warmund, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director